APPENDIX A

IN THE COURT OF APPEALS FOR
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

(Filed July 12, 1982)

STATE OF OHIO,
Plaintiff-Appellee,

vs.

NED LUTZ,
Defendant-Appellant.

JUDGES:
Hon. Robert E. Henderson, P. J.
Hon. Norman J. Putman, J.
Hon. John R. Milligan, J.

OPINION

Case No. CA-81-18

Decided:————

APPEARANCES:

FLEET FREEMAN, PROSECUTING ATTORNEY
COSHOCTON COUNTY, OHIO
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ATTORNEY FOR PLAINTIFF-APPELLEE

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ATTORNEY FOR DEFENDANT-APPELLANT

MILLIGAN, J.

The Bribery - Speedy Trial - "Valuable Benefit" Construed.

The defendant-appellant was sentenced following his conviction by a Coshocton County Common Pleas Court jury of bribery, R. C. Section 2921.02 (A). He appeals, charging six errors:

I. THE TRIAL COURT'S OVERRULING OF DEFENDANT'S MOTION TO DISMISS FOR FAILURE OF STATE TO COMPLY WITH O.R.C. 2945.71 AND RULE 8 OF SUPREME COURT OF OHIO SUPERINTENDENCE RULES WAS PREJUDICIAL ERROR.

II. THE TRIAL COURT ERRONEOUSLY OVERRULED THE DEFENDANTS MOTION

FOR JUDGMENT OF ACQUITTAL AT THE CLOSE OF THE STATE'S EVIDENCE AND AT THE CLOSE OF THE DEFENDANT'S EVIDENCE.

III. THE FINDING OF GUILTY IN THIS MATTER IS AGAINST THE WEIGHT OF THE EVIDENCE; AND THE COURT SHOULD HAVE GRANTED THE DEFENDANT'S MOTION FOR ACQUITTAL.

IV. THE TRIAL COURT IMPROPERLY ADMITTED EVIDENCE, OUR (SIC) OBJECTION OF THE DEFENDANT, AS TO LIQUOR VIOLATIONS WHICH CONSTITUTED HEARSAY (SIC); WHICH WERE IMMATERIAL TO THE ISSUES IN THIS CASE; WERE PREJUDICIAL TO THIS DEFENDANT WITH THE JURY; AND CONSTITUTED AN ABUSE OF DISCRETION.

V. COURT ERRONEOUSLY ADMITTED INTO EVIDENCE STATE EXHIBIT NO. 3 AND SAME WAS PREJUDICIAL ERROR.

VI. TRIAL COURT DENIED DEFENDANT'S COUNSEL THE OPPORTUNITY TO POINT OUT IN COUNSEL'S ARGUMENT TO THE JURY THE MATTER OF THE ABSENCE OF CERTAIN PERSONS AS WITNESSES IN THE CASE FOR THE PLAINTIFF AND WHAT ELEMENTS OF THE CASE SUCH WITNESSES COULD OFFER TESTIMONY. SUCH DENIAL WAS PREJUDICIAL ERROR.

From the evidence, the jury was entitled to believe that following a visit by a police officer (McKay) and a juvenile informant to a beer carryout store owned by the defendant's wife and another, where the defendant's wife was confronted with a claim of illegal sale of intoxicants to a juvenile, the defendant confronted another officer (Tatten – a shift commander lieutenant) and attempted to bribe him.

> "Q. What happened when you got out of your vehicle, Mr. Tatten, did you initiate any conversation?
>
> A. No sir. I stepped out of the car and Mr. Lutz aproached me and he said, 'I'm pissed at McKay.' He said, 'Those guys tried to set me up.' I assume he was referring to Officer McKay and Mathews. He said McKay had gotten into his face and had threatened his wife. He said they had threatened to arrest her and was very loud and belligerent. I had talked to the officers at the police station earlier, and because of this I asked Mr. Lutz, I said, it was my understanding that your wife was the only one that was loud. He said, well she is from the south, and she always talks that way. She may have been a little loud. He said, 'I'm going to go down Monday morning and file a complaint with the chief.' He said, 'I am also going to have my wife file charges on McKay.' He said, something about McKay leaving and saying fuck it. Then he said, 'If you stop these charges from going to the State Liquor Control Board,' he said, 'I'll stop my wife from filing charges on McKay.' He said that those charges, if those charges are filed, it's going to make you look bad. You are the shift lieutenant and you are responsible for these men. I don't want to get you in trouble, but it is your responsibility and it is going to make your officers look bad. He said, 'McKay is a punk kid and he is going to lose his job. I'll have his badge.' He says, 'It is going to

make the whole department look bad.' He says, 'I don't want to do it.' I said, 'Well, Mr. Lutz, if your wife has charges she is going to have to prove them to start off with.' I said, I am not going to interfere with my men's case. This is liquor business, and I'm not going to interfere. We'll look into your complaint though. He started to turn around and started to leave and go back towards his car. He turned around and he pointed back and he said, 'You take care of your end and I'll take care of mine. You stop those charges from going to the State and I won't file charges.' "
R-61, 62.

This evidence was corroborated.

I.

Speedy trial.

Did the clock run on this prosecution? The defendant argues he was not brought to trial (1) within the statutory proscriptions of legislative speedy trial, nor (2) within the provisions of Superintendency Rule 8.

Defendant was tried 296 days (charging triple jail time) after the original arrest, in derogation of R. C. Section 2945.71 (C) (2) — the 270-day rule. The state claims it is saved by the extension compliance authorized by R. C. Section 2945.72. The chronology is:

Note	Date	Action	Charged To State	Not Charged To State
1	9/19/80	Defendant arrested on Municipal Court affidavit.	3	
	9/20-10/1	Defendant on bond in Municiple Court.	11	
	10/1	Charge dismissed.		
2	10/1-10/8	No charge pending.	8	
1	10/9	Defendant arraigned following Grand Jury indictment.	3	
	10/10-10/21	Defendant on bond, Common Pleas Court.	12	
3	10/21-11/12	Defendant's motion to dismiss filed and ruled upon.		21
	11/12/80-6/10/81	Defendant awaiting trial.	211	
4	6/10-6/23	State's motion for continuance. Trial set July 7, 1981.		17
	6/17	Defendant filed motion to dismiss - speedy trial.		
5	6/23	Defendant filed motion to vacate trial date - trial set July 14.		
	7/7	Original trial date.		
	7/7-7/14	Delay per request of accused.		7
		TOTAL	248	45

NOTE 1.

The defendant is entitled to triple time credit. R. C. Section 2945.71 (E).

NOTE 2.

We reject the state's contention that *State* v. *Justice,* 49 O. App. 2d 46, 3 O.O. 3d 109, is distinguishable. In *Justice,* the same charge, upon the same facts, was filed in the same court where the original action was dismissed. Here, the original felony affidavit was filed in the Municipal Court and the second arrest following Common Pleas

Grand Jury indictment was upon the same charge, upon the same facts, in a different court. The critical issue addressed in *Justice* was:

> "We have, therefore, an identical charge growing out of an identical set of facts resulting in a trial and conviction of a defendant without the 90 day period provided by statute."
>
> *Justice,* supra.

Here, the record shows that the same charge, based upon the same facts, was filed in a different court within the same county. The identity of the court is not the critical concern, and is insignificant when measured against the purposes of the Speedy Trial Act and the rights accorded a person charged with crime in Ohio.

NOTE 3.

The defendant's motion to dismiss triggers R. C. Section 2945.72 (E) :

> "The time . . . may be extended only by the following:
>
> (E) Any period of delay necessitated by reason of . . . motion, proceeding, or action made or instituted by the accused."

We hold that the accused's motion to dismiss tolls the clock. It is not necessary for the state to prove, or the court to affirmatively find, that such motion, standing alone, delayed the proceeding. *State* v. *Walker,* 42 O. App. 2d 41, 71 O.O. 2d 238.

State v. *Tope,* 53 Ohio St. 2d 250, 7 O.O. 3d 408 (1978), cited by the appellant, is facially irrelevant.

NOTE 4.

The state was granted an *ex parte order* continuing the trial date because an unnamed witness would suffer a hardship arising out of a pre-planned and paid-for vacation. This continuance does not run afoul of the Ohio Supreme Court's interpretation of R. C. Section 2945.72 (H), last clause.

Elmwood Place v. *Denike,* 56 Ohio St. 2d 427, 10 O.O. 3d 528 (1978), stands for the proposition that when delay is facially unreasonable, the record must affirmatively show sufficient facts to support the reasonableness of the order. Here, the delay is not facially unreasonable.

In *State ex rel. Atkins* v. *Denton* 63 Ohio St. 2d 192, 17 O.O. 3d 118 (1980), the court held that a second continuance for unavailability of a witness demonstrated a prosecutorial lack of diligence and the continuance was not reasonable. Here, we have no evidence of lack of diligence by the state.

NOTE 5.

At the request of the defendant on June 23, 1981, the trial court granted, on June 30, the motion and continued the trial to July 14 from July 7. In his motion, the defendant sought to cling to his speedy trial request, at the same time asserting personal trial schedule conflicts. The delay from July 7 to July 14 does not count against the state. Revised Code Section 2945.72 (H).

The period from filing to ruling is also not chargeable to the state. Revised Code Section 2945.72 (E).

Finally, we find that the trial, 296 days after the original arrest, does not entitle the defendant to dismissal pursuant

to Superintendency Rule 8. *State* v. *Westbrook,* 47 O. App. 2d 211, 1 O.O. 3d 284 (1975).

> "A further point to be considered is the fact that Superintendency Rule 8 (B) has no condition specifying that failure of compliance justifies the discharge of an accused."
>
> *State* v. *Lacy,* 46 O. App. 2d 215, 75 O.O. 2d 376 (1975).

The first Assignment of Error is overruled.

II.

Did the court err in overruling the defendant's motion for acquittal?

Although the defendant might have been charged with other offenses arising out of the conduct found by this jury, the evidence supports the finding that the hope of forbearance to prosecute is a "valuable benefit" within the penumbra of Revised Code Section 2921.02. See *State* v. *Lieberman,* 114 O. App. 339 (1961).

The second Assignment of Error is overruled.

III.

The verdict and judgment is supported by competent, corroborated evidence, and is not against the weight of the evidence.

The third Assignment of Error is overruled.

IV.

The admission of testimony regarding the liquor law violation was clearly within the discretion of the trial

judge. It had a bearing upon credibility and was offered for purposes of impeachment.

The fourth Assignment of Error is overruled.

V.

The admission of a photograph of the "scene" without elaborate foundation was not prejudicial. See Evidence Rule 901 (A) and 1008.

The fifth Assignment of Error is overruled.

VI.

The defendant's counsel was permitted to make substantially the same comment he now claims was later denied to his prejudice. See Record-402, 403, and 404.

We find, upon an examination of the entire final argument, that the trial court properly controlled the argument, and that his ruling was neither an abuse of discretion nor prejudicial to the defendant.

The sixth Assignment of Error is overruled.

The verdict and judgment of the Coshocton County Court of Common Pleas is affirmed.

Henderson, P.J., and

Putman, J., concur

/s/ JOHN R. MILLIGAN
/s/ NORMAN J. PUTMAN
/s/ ROBERT E. HENDERSON
JUDGES

IN THE COURT OF APPEALS FOR
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO,
Plaintiff-Appellee,

vs.

NED LUTZ,
Defendant-Appellant.

JUDGMENT ENTRY

(Filed July 12, 1982)

CASE NO. CA-81-18

For the reasons stated in the Memorandum-Opinion on file, all Assignments of Error are overruled, the verdict and judgment of the Coshocton County Court of Common Pleas is affirmed, and this cause is remanded to that court for execution of sentence.

/s/ JOHN R. MILLIGAN
/s/ NORMAN J. PUTMAN
/s/ ROBERT E. HENDERSON
JUDGES

APPENDIX B

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1982 TERM
City of Columbus.) To wit: October 6, 1982

No. 82-1210

STATE OF OHIO,

Appellee,

vs.

NED LUTZ,

Appellant.

APPEAL FROM THE COURT OF APPEALS
for Coshocton County.

This cause, here on appeal as of right from the Court of Appeals for Coshocton County, was considered in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Coshocton County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this . . . . day of . . . . . 19 . . . .
. . . . . Clerk
. . . . . Deputy

THE SUPREME COURT
OF THE STATE OF OHIO

THE STATE OF OHIO,) 1982 TERM
City of Columbus.) To wit: October 6, 1982

No. 82-1210

STATE OF OHIO,

Appellee,

vs.

NED LUTZ,

Appellant.

MOTION FOR LEAVE TO APPEAL
FROM THE COURT OF APPEALS
for Coshocton County.

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Robert L. McCarty.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court
this . . . day of . . . . . 19 . . . .
. . . . . Clerk
. . . . . Deputy